Supreme Court, U. S.
FILED
APR 25 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-1530

ALVIN E. HARBIN,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner, Alvin E. Harbin, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on January 27, 1978.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit as yet unreported, appears at Appendix "A". The Court of Appeals for the Sixth Circuit reversed the jury verdict and judgment for Petitioner in the United States District Court for the Northern District of Ohio, Eastern Division (Appendix "B") and entered final judgment for Respondent. There was a Jury Verdict and the Jury's Answers to Interrogatories but no formal Opinion of the District Court.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 27, 1978. (See Appendix "A") This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Does the act of a ship's officer (Alvin Highberg) in clubbing a subordinate seaman (Seaman Harbin) with a steel pipe two and one-half (2 1/2) to three (3) foot in length so as to knock the seaman to the ship's deck injuring him, create an issue for jury determination as to the ship being unseaworthy?

II

Where the evidence of all witnesses established affirmatively that plaintiff had never caused any trouble while aboard ship, is it within the realm of permissible final argument to affirm that the evidence did not establish plaintiff as a "bad guy", when the jury was uninformed that the last time that plaintiff ran afoul of the law was some fifteen (15) years before the date of the trial, which evidence the court excluded under Federal Rule of Evidence 609(b)?

STATUTES INVOLVED

The relevant statutory provisions are Title 46 U.S.C. Section 688 and Federal Rule of Evidence Section 609 which are set out in Appendix "C" to this Brief, *infra*, p. A19).

STATEMENT OF FACTS

Petitioner, Alvin Harbin, a Seaman, brought this action for damages in tort and for maintenance and cure against Respondent, his employer, Interlake Steamship Company under the Jones Act, 46 U.S.C. §688, and the General Maritime Law. Seaman Harbin's claim was based on an unprovoked assault and battery with a dangerous weapon upon him by an officer of the ship, Officer Alvin Highberg.

The assault and battery took place on board defendant's vessel, the Steamer E.G. Grace, while the vessel was unloading cargo at Buffalo, New York, on the evening of December 11, 1973.

Petitioner, Seaman Harbin, was one of four (4) men on watch in the vessel's machinery spaces.

On the evening Petitioner was struck by the iron pipe, he was on duty in the fire hold and engine room. The assailant, Officer Highberg, was the ship's second Assistant Engineer, and was then acting as the Engineer of the watch.

Officer Highberg was standing a six (6) hour watch from 6:00 p.m. to 12:00 midnight. The usual watch was four (4) hours. Officer Highberg had been on duty a total of eighty-four (84) hours in the preceding seven (7) days and had had no days off in the preceding couple of weeks. Both circumstances occurred because the ship was being operated short handed.

Upon beginning his extended watch at 6:00 p.m., Officer Highberg, accompanied by a wiper (Defendant's employee seaman) was in the process of repairing a leaking oil seal. Seaman Harbin, Petitioner, was waiting for a spoken instruction from Officer Highberg. Petitioner was out of the sight of Officer Highberg. Officer Highberg

shouted the instruction at Seaman Harbin to change the settings of a lever effecting the device on which Officer Highberg was working. Due to the noise level in the engine room and machinery spaces, Seaman Harbin couldn't hear or understand what it was Officer Highberg was shouting for him to do and did nothing. Officer Highberg left the area in which he was working and came down a ladder to where Seaman Harbin was working. Officer Highberg was carrying a two and one-half (2 1/2) to three (3) foot steel pipe in his hand as he approached Petitioner.

Officer Highberg confronted Seaman Harbin about the latter's failure to carry out orders and a verbal exchange ensued. Seaman Harbin turned his back and started to walk away from Officer Highberg who then wielded the iron pipe he held striking Petitioner with a single blow in the back and hip with such ferocity as to knock Petitioner to the ship's floor. Petitioner remained on the floor for three or four minutes. Officer Highberg during the time Petitioner lay on the floor left the scene. Petitioner had done nothing to provoke the unexpected and uncalled for attack.

The blow from the pipe came while Seaman Harbin's back was turned and struck him in the back and left hip. He sustained injuries to his left hip and back, including a hematoma four to six inches in diameter and resultant injury to his low back, including muscle spasms and chronic low back pain. At trial there was unrefuted medical testimony that the back and hip injury had been caused by a blow from a pipe like instrument which blow was the direct and proximate result of Petitioner's low back injury.

Petitioner, after pulling himself from the floor, stood the remaining hour of his watch, then went to his cabin.

He complained of the events of the watch to his roommate, but did not discuss the attack itself.

At about 10:00 p.m. of the same evening, Seaman Harbin while off duty, returned to the engine room and confronted Officer Highberg. Following swearing and verbal threats, Seaman Harbin used his hands to knock Officer Highberg to the floor. Highberg grasped Seaman Harbin around the legs, thereby knocking Petitioner to the floor. In the ensuing tussle, Officer Highberg bit Petitioner's thumb lacerating it. Other members of the crew then broke up the altercation. Seaman Harbin was later discharged from the ship for having engaged in this second fight.

At the trial of the within action, the Court excluded the following evidence offered by Defendant:

> 1. That Seaman Harbin had been convicted of two felonies; interstate transportation of a stolen car and armed robbery. The convictions were excluded under Federal Rule of Evidence 609 due to their predating the incident in question by some eighteen and fifteen years respectively.
>
> 2. That Seaman Harbin had once mentioned to Acting Chief Engineer Furrie that he tried to avoid drinking because he became "pretty wild" when he did so.

Defendant made no claims on appeal that the Court erred in excluding the above proffered evidence, rather, Defendant questioned the propriety of the Petitioner's counsel's Closing Argument, the pertinent portion of which reads:

> Mr. Stewart: I believe that there is no testimony in this case that Al Harbin is a bad guy, there is

no one who has been called to say that he is a bad actor, a bad fellow. If he had been, or if such evidence were available, Interlake would have brought witnesses from all over, as they have already done so, all over to testify concerning the malevolent nature of Al Harbin, that he is a bad egg.

Mr. Davies: Your Honor, I object.

The Court: Approach the bench gentlemen. Approach the bench.

(Following proceedings had out of hearing of the jury.)

Mr. Davies: Such evidence would have been irrelevant, I don't believe it is proper argument.

(Reporter read back the last portion of the argument.)

The Court: That is his interpretation.

Mr. Davies: Well, Your Honor, in so far as felony convictions are concerned, so far as prior arrests are concerned, this would have been excluded, and I see no way any contrary evidence would have been admitted.

The Court: Overruled.

(Following proceedings had back in hearing of the jury.)

Mr. Stewart: There was no such evidence.

They, Interlake, brought before you Mr. Mikkola. And they took advantage of Mr. Mikkola's testimony, as you heard it from the witness stand, because it was just, according to Mr. Mikkola, a short point in time ago that he was asked to come and tell you or ask about the events involving Mr. Highberg's activ-

ities with him on the night of this occurrence. Do you remember what he had to say? Surely, if they would bring Mr. Mikkola to tell you about the night's events in such short notice of requesting information from him when it is two some odd years later, they would have brought other people to testify concerning Mr. Harbin.

Mr. Davies: Your Honor, may I make a Statement on the record, please?

(Following proceedings had out of hearing of the jury.)

Mr. Davies: Your Honor, I move for mistrial on the grounds of improper argument.

The Court: What is the basis for it?

Mr. Davies: The same thing, your Honor. This would not have been admissible had we brought it in.

(Reporter read back the last portion of the argument.)

The Court: Overruled.

The Jury was presented and answered the following Interrogatories clearly establishing that it believed Petitioner. It also believed that Officer Highberg was not a suitable officer equal to ordinary officers of his calling.

Interrogatory No. 1:

Did Alvin Highberg strike Alvin E. Harbin with a steel pipe during the course of the first altercation that occurred between the hours of 6:15 p.m. and 7:10 p.m. on the evening of December 11, 1973?

Answer: Yes.

Interrogatory No. 2:

Was Alvin Highberg, the second assistant engineer, an officer not equal in disposition and seamanship to ordinary officers and men in his calling?

Answer: Yes.

The jury returned a verdict in Petitioner's favor on December 8, 1975. On January 6, 1976, defendant filed a Notice of Appeal from that Judgment. On January 9, 1976 the parties filed a Stipulation to the amount that Seaman Harbin would be entitled to recover as maintenance and cure, Two Thousand Eight Hundred Seventy-Two Dollars ($2,872.00), conditioning the finality of such award upon the ultimate disposition of the tort Judgment, and the Court dated its Judgment upon such stipulation, January 8, 1976. On January 20, 1976, Defendant filed a second Notice of Appeal intending that appeal to be from the Judgment on both claims and on January 22, 1976, the parties stipulated that the Appeals based upon the two notices could be consolidated.

On January 27, 1978, two years later, the United States Court of Appeals for the Sixth Circuit reversed the decision of the Trial Court. In so doing the Court of Appeals usurped the jury, became the trier of facts and held as a matter of law that an unprovoked attack with a steel pipe two and one-half (2 1/2) to three (3) feet in length is not in and of itself such a savage and vicious act as to make a vessel UNSEAWORTHY as that term is defined under Jones Act and case law. Alternatively, the Court of Appeals remanded the case for a new trial holding that counsel for Petitioner had transgressed the boundaries of permissible closing argument.

Seaman Harbin petitions this Court to grant his Writ of Certiorari to review the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT A SHIP'S OFFICER (ALVIN HIGHBERG) IN CLUBBING A SUBORDINATE SEAMAN (SEAMAN HARBIN) WITH A STEEL PIPE TWO AND ONE-HALF (2 ½) TO THREE (3) FEET IN LENGTH SO AS TO KNOCK THE SEAMAN TO THE SHIP'S DECK AND INJURE HIM, CREATES NO ISSUE FOR JURY DETERMINATION AS TO THE SHIP BEING UNSEAWORTHY. THE DECISION OF REVERSAL IS TANTAMOUNT TO A DECISION ON THE MERITS BASED ON THE EVIDENCE.

The United States Court of Appeals for the Sixth Circuit erred in holding that as a matter of law an unprovoked attack with a two and one-half (2 1/2) to three (3) foot steel pipe by an officer against a Seaman raises no jury issue as to the unseaworthiness of the vessel.

There are at least two ways to prove that conduct of the vessel's employees makes the vessel unseaworthy. First, in general terms, by proving the employee has a wicked disposition. Second, again in general terms, by showing the employee instituted an attack with a dangerous weapon.

The Sixth Circuit Court of Appeals based its decision in the instant case squarely on the Supreme Court's decision in *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955). In *Boudoin*, this Court held that an assault by one Seaman on another with a bottle evidenced that the assailant was not equal in disposition to the usual and customary standards of ordinary men in the calling. In

setting the standard to which Seamen must conform their conduct the Supreme Court in *Boudoin* quoted *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir. 1953) (Opinion of Judge L. Hand):

> All men are to some degree irascible . . . Sailors lead a rough life and are more apt to use their fists than an office employee: What will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the disposition of "the ordinary men in the calling." 204 F.2d at 817.

In its opinion, the Sixth Circuit Court of Appeals equates an attack with a two and one-half (2 1/2) to three (3) foot steel pipe with an attack by fisticuffs. A two and one-half (2 1/2) foot steel pipe is not a fist, not even Joe Louis' fist. In so relying on *Boudoin*, the Court of Appeals has subverted the meaning and intent of *Boudoin* and has rendered an opinion directly in conflict with interpretations of *Boudoin* as expressed by other District and Appellate Courts.

There is a conflict between two Circuit Courts of Appeals.

The specific language of *Boudoin* which is the subject of diverse interpretation states in part:

> The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of a Seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? 348 U.S. at 339-40.

In interpreting the *Boudoin* standard, the Fifth Circuit Court of Appeals in *Clevenger v. Star Fish and Oyster*

Company, 325 F.2d 397 (5th Cir. 1963) (citing *Walters v. Moore-McCormack Lines, Inc.*, 309 F.2d 191 at 199 (2d Cir. 1962) stated that unseaworthiness can be established in two totally divergent methods:

> In those assault cases where the issue of unseaworthiness has been held properly submissible to a jury, the hallmark has been *either* (1) an assault with a dangerous weapon or (2) independent evidence of the assailant's exceptionally quarrelsome nature, his habitual drunkenness, his severe personality disorder or other similar factors. 309 F.2d at 193. (Emphasis and enumeration added)

Therefore, Petitioner can prove unseaworthiness in the instant case by following either of two avenues. First: By establishing an altercation and then relying on Officer Highberg's prior history to show a "wicked disposition, a propensity to evil conduct, a savage and vicious nature". Or, second and alternatively, by establishing what has been referred to as "instantaneous unseaworthiness" wherein a single attack with a dangerous weapon is deemed to establish a "wicked disposition, a propensity towards evil conduct, a savage and vicious nature" thereby constituting sufficient evidence of Officer Highberg's failure to meet the "usual and customary disposition of ordinary men in the calling". Officer Highberg failed to meet such standard, his presence aboard the vessel made the *vessel itself unseaworthy*.

It is this second avenue, that of "instantaneous unseaworthiness", upon which Petitioner relies in the instant case.

Petitioner asserts that, contrary to the Sixth Circuit Court of Appeals' ruling, an Officer's attack on a Seaman with a two and one-half (2 1/2) to three (3) foot steel

pipe is an attack with a very dangerous weapon and thereby constitutes a sufficiently savage and vicious act so as to present a jury question as to the unseaworthiness of the vessel. Remember the jury here minimally found it to be an act not equal to the calling of an officer. In rejecting Petitioner's position, the Sixth Circuit Court of Appeals impliedly rejected the holdings of numerous District and Appellate Courts wherein the *Boudoin* decision has been held to encompass the doctrine of "instantaneous unseaworthiness".

In *Jones v. Lykes Bros., S.S. Co., supra,* Judge L. Hand held that there was no violation of seaworthiness, even though one Seaman beat another without provocation, resulting in severe injuries. Judge Hand expressly based his conclusion on the finding that *no weapon* was involved and that the attacker was not an exceptionally quarrelsome person. The plaintiff in *Jones, supra,* failed to prove either the use of a dangerous weapon or a past history of violence and therefore that Court correctly ruled that there was no issue of unseaworthiness presented.

In cases involving attacks *with dangerous weapons* the Courts have uniformly held such attacks to be in and of themselves sufficient proof that the attacker was not equal in disposition to the ordinary Seamen in the calling. In the leading case of *Clevenger v. Star Fish and Oyster Company, supra,* the Fifth Circuit Court of Appeals affirmed the principle of "instantaneous unseaworthiness". In *Clevenger,* a Seaman was stabbed in the back with an ice pick. There was no evidence of prior misconduct on the part of the assailant. The Court nevertheless held:

> . . . that in itself a savage assault with . . . [a] dangerous weapon, can be sufficient proof that the attacker is "not equal in disposition and seamanship to the ordinary men in the calling". *Id.* at 402.

Accord: Thompson v. Coastal Oil Company, 119 F. Supp. 838 (D. N.J. 1954), *rev'd on other grounds* 221 F.2d 559 (3rd Cir. 1955) (assailant who struck seaman in head three times with a meat cleaver held by Court to have rendered ship instantaneously unseaworthy); *Handley v. United States,* 157 F. Supp. 616 (S.D. N.Y. 1958) (assailant stabbed seaman with pocket knife held to render the ship unseaworthy); and *Smith v. Lauritzen,* 201 F. Supp. 663 (E.D. Pa. 1962) (a longshoreman's use of two cargo hooks was seen as sufficiently vicious to allow a jury to consider the question of instantaneous unseaworthiness).

The Court of Appeals for the Sixth Circuit also erred in holding that the same standard of conduct applies to Officers as applies to Seamen. *The Sixth Circuit Court of Appeals stands alone in that pronouncement.* Cases cited by Petitioner to the Sixth Circuit Court of Appeals establish that there is a higher standard of behavior for an Officer as compared to a "lowly" Seaman's conduct. In contrast to and in conflict with the holding of the Sixth Circuit Court of Appeals in the instant case, is the case of *Hildebrand v. Steamship Commander,* 247 F. Supp. 625 (E.D. Va. 1965). *Hildebrand* involved an unprovoked fist fight between two (2) officers of the vessel. In addressing itself to the standard of conduct to which officers must conform, that District Court stated:

> . . . We think that other officers and members of a crew of a vessel have the right to expect that the character and behavior of an officer will be somewhat better than that of an ordinary seaman. *Id.* at 628.

That District Court did imply that it is not within the disposition and character of an officer of a vessel to engage in a fight with another member of the vessel. (*Accord*: *Handley v. United States*, 157 F. Supp. 616 (S.D. N.Y. 1958). In fact, Respondent's officer, Alvin Highberg, unequivocally stated that it was not the normal disposition of an ordinary officer aboard a Great Lakes steamship to strike a crew member of the vessel. Where does the law of the land empower the Sixth Circuit to issue its decree that Officer Highberg doesn't know what he was saying when he so testified? Who is the better judge of an officer's conduct? Certainly the better judge is a ship's officer as compared to a law judge! It was an abuse of appellate power to strike from all consideration Officer Highberg's testimony as to the standards for the conduct of an officer. Clearly the Sixth Circuit Court of Appeals holding in favor of seaworthiness becomes even less tenable in light of the higher standard of conduct to which officers must conform.

Whenever a weapon has been used the Courts have ruled such use to evidence an evil disposition sufficient to warrant submission of the question of unseaworthiness to the jury.

The Sixth Circuit Court of Appeals cited four cases in support of its assertion that an officer of disposition equal to that of ordinary men in the calling will, on occasion, assault seaman with a dangerous weapon. *Is the suggestion meritorious*? Petitioner will show why it is not.

In *Gulledge v. United States*, 474 F.2d 1340 (3rd Cir. 1973), *aff'd*, 337 F. Supp. 1108 (E.D. Pa. 1972), the Third Circuit Court of Appeals affirmed the District Court ruling and stated that the use of a "mug" by a seaman in an

assault could not form the basis for an instruction on "instantaneous unseaworthiness" where the evidence failed to establish *who first* used the mug as a weapon *or that any damage resulted* from the use of such mug. That Court clearly inferred that if the identity of the person first using the mug as a weapon were established, and evidence presented that injuries resulted from the use of the mug, then the Court would submit the issue of "instantaneous unseaworthiness" to the jury. *Certainly, if an assault with a mug warrants the submission of the issue of INSTANTANEOUS UNSEAWORTHINESS to the jury,* in the instant case, an attack with a two and one-half (2 1/2) to three (3) foot steel pipe warrants a jury determination on the issue of unseaworthiness. It must be remembered that the jury in the instant case in an answer to an Interrogatory found the ship unseaworthy.

The Sixth Circuit Court of Appeals also cited *Robinson v. S.S. Atlantic Starling*, 369 F.2d 69 (5th Cir. 1966), *cert. denied*, 386 U.S. 993 (1967), *Connolly v. Farrell Lines, Inc.*, 268 F.2d 653 (1st Cir. 1959), *cert. denied*, 361 U.S. 902 (1959) and *Stankiewicz v. United Fruit Steamship Corp.*, 229 F.2d 580 (2d Cir. 1956). In each of these cases a weapon was used in an assault, but all are factually distinguishable in that Seamen only were involved and *in each case there existed sufficient PROVOCATION* so as to lower the threshold level at which even a seaman of disposition equal to that of ordinary men in the calling would resort to the use of a weapon in an assault and battery. No such PROVOCATION was present in the instant case and therefore the Sixth Circuit Court of Appeals' reliance on these cases is misguided and misplaced. In fact, the lack of PROVOCATION in the instant case provides substantial evidence of Officer Highberg's failure to conform his conduct to that of ordinary officers of

the calling. Defendant had kept Officer Highberg on duty for an excessive period of time as the ship was undermanned. The Court in *Hildebrand v. Steamship Commander*, 247 F. Supp. 625 (E.D. Va. 1965) stated:

> . . . When an assailant acts under no provocation whatsoever and his movements have not been stimulated by intoxicating beverages, such facts go a long way in establishing a seaman's vicious nature. *Id.* at 628.

The Supreme Court of United States should grant Certiorari to resolve the conflict between the United States Court of Appeals for the Sixth Circuit in the case at bar and the decisions of other Circuit Courts of Appeal (noted herein) on the question of whether the use of a deadly weapon by an officer in an unprovoked attack presents a jury issue as to the ship's unseaworthiness.

From this time forward seamen had best beware as superior officers can without provocation strike and injure a seaman with an iron pipe two and one-half (2 1/2) to three (3) foot long with immunity from suit, if the blow lands other than on the head. A two century step backwards in Maritime Law is signaled by the Appellate Ruling in this case taking us to a time when the belaying pin was the weapon of choice.

II. WHERE THE EVIDENCE OF ALL WITNESSES ESTABLISHED AFFIRMATIVELY THAT SEAMAN HARBIN HAD NEVER CAUSED ANY TROUBLE WHILE ABOARD SHIP, IT WAS WITHIN THE REALM OF PERMISSIBLE FINAL ARGUMENT TO AFFIRM THAT THE EVIDENCE DID NOT ESTABLISH HIM AS A "BAD GUY", WHEN THE JURY WAS UNINFORMED THAT THE LAST TIME SEAMAN HARBIN RAN AFOUL OF THE LAW WAS SOME FIFTEEN (15) YEARS PRIOR TO THE DATE OF TRIAL, WHICH EVIDENCE THE COURT PROPERLY EXCLUDED UNDER FEDERAL RULE OF EVIDENCE 609(b).

The United States Court of Appeals for the Sixth Circuit erred in reversing the judgment of the Trial Court. The Court of Appeals improperly ruled that counsel's closing argument on behalf of Petitioner transgressed the bounds of propriety based on counsel's affirmation that the evidence had not established the Petitioner to be a "bad guy".

In the oft cited case of *Hockaday v. Red Line, Inc.*, 174 F.2d 154 (D.C. Cir. 1949), the Court of Appeals for the District of Columbia addressed the issue of the permissible scope of closing argument. The Court stated:

> This Court believes that the widest possible latitude should be allowed to the discretion exercised by the Trial Court because, under the circumstances in which an utterance is made and in the heat of a trial before a jury, the trial judge is more capable of understanding what may or may not prejudice either of the parties. *Id.* at 156.

Clearly, great deference must be given to the decision of the Trial Judge. Why was it not done so here? The Trial Judge is far and away, indeed indisputably, more capable of understanding what may or may not prejudice either of the parties based on his knowledge of the trial as a totality than a reviewing Court. The Sixth Circuit Court of Appeals erred in taking six lines of a closing argument out of context and out of perspective in terms of the trial itself and then basing a decision in the instant case on such disembodied evidence. In so holding the Sixth Circuit Court of Appeals has unsurped the *front line* discretion of the Trial Court, a discretion that, according to the Court in *Hockaday,* is to be given the widest possible latitude.

The Sixth Circuit Court of Appeals has replaced the trial judge's informed understanding of what may or may not prejudice either of the parties with its own opinion, which opinion lacks the firsthand knowledge upon which such a decision must of necessity be based.

Counsel for Petitioner affirmed in closing argument facts which were the subject of testimony at trial and therefore were proper subjects for inclusion in closing argument. Defendant's own witnesses testified that Petitioner did nothing to provoke the assault on him by Officer Highberg. In addition, Petitioner had not been drinking, was without blemish on his seaman's record for about Twenty Five (25) years, and, in the words of defendant's own crewmen, the Petitioner was easy to get along with. The Sixth Circuit Court of Appeals erred in holding that, based on the unrefuted facts of this case, a passing reference to Petitioner not being a "bad guy" was sufficient in and of itself to establish as a matter of law that the jury may thereby have been prejudiced in returning a verdict in Petitioner's favor.

The decision of the Sixth Circuit Court of Appeals if permitted to stand, completely obliterates the rule of law and logic which dictates that great deference must be given to the opinion of the Trial Court in matters regarding the propriety of closing argument and the possible prejudice resulting therefrom. Second-guessing under the circumstances here is an oppressive and unjust intrusion into the heat of battle by those insulated from other than calm, reflective judgments. A more appropriate question is: Was it a gross abuse of discretion? Here, based on the facts the reply must be—No Way!

This court should grant Petitioner's Writ of Certiorari to resolve the conflict between the United States Court of Appeals for the Sixth Circuit in the case at bar and the decision of the Court of Appeals for the District of Columbia in *Hockaday, supra,* on the question of the permissible scope of closing argument, and reverse the decision remanding this cause for retrial.

CONCLUSION

For the reasons aforesaid it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

(Filed January 27, 1978)

No. 76-1568

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALVIN E. HARBIN,
Plaintiff-Appellee,

v.

THE INTERLAKE STEAMSHIP COMPANY,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Before: WEICK and CELEBREZZE, *Circuit Judges,* and GRAY,* *District Judge.*

WEICK, *Circuit Judge.* The plaintiff, Alvin E. Harbin (Harbin), a seaman, sued his employer, Interlake Steamship Company (Interlake), in the District Court, for damages in tort and for maintenance and cure under the Jones Act, 46 U.S.C. § 688, and the general maritime law. Juris-

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*The Honorable Frank Gray, Jr., Senior District Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

diction was also invoked by reason of diversity of citizenship, 28 U.S.C. § 1332.

The tort was an alleged assault and battery committed upon plaintiff by another crewman, Alvin E. Highberg (Highberg), who was a second assistant engineer on board the steamer E. G. Grace, while the ship was in dock at Buffalo, New York.

In his complaint Harbin alleged negligence on the part of the ship's owner, Interlake, "in knowing and allowing Alvin Highberg to work as an officer on said ship despite his malicious and savage nature," and/or the unseaworthiness of the ship for the reason that Highberg "was an incompetent crew member by reason of his savage and vicious nature."

The case was tried before a jury. The District Court denied motions made by Interlake for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. The Court also denied Interlake's motion for a mistrial because of an alleged improper argument made by plaintiff's counsel to the jury. The Court submitted to the jury only the issue of unseaworthiness of the ship, and not any issue of negligence. The jury returned a verdict in favor of plaintiff in the amount of $10,000, and also answered special interrogatories as follows:

Interrogatory No. 1:

Did Alvin Highberg strike Alvin E. Harbin with a steel pipe during the course of the first altercation that occurred between the hours of 6:15 P.M. and 7:10 P.M. on the evening of December 11, 1973?

Answer: Yes

Interrogatory No. 2:

Was Alvin Highberg, the second assistant engineer, an officer not equal in disposition and seamanship to ordinary officers and men in his calling?

Answer: Yes.

Interrogatory No. 3:

Did defendant's breach of its warranty of seaworthiness proximately cause or in any way contribute to injuries, if any, suffered by the plaintiff?

Answer: Yes.

Interrogatory No. 4:

What sum of money do you find, if any, will fairly compensate plaintiff?

Answer: $10,000.00.

The Court entered judgment on the verdict for $10,000 and costs, and also for $2,872 on the stipulated maintenance and cure count. We reverse the judgment on the verdict and affirm on the maintenance and cure count.

The facts of the case were very much in dispute. There was no dispute, however, about the fact that there were two assaults, rather than just one, committed during the evening of December 11, 1973. One was the assault which the jury found was committed by Highberg on Harbin between 6:15 and 7:10 p.m., and the other was an assault committed by Harbin on Highberg about two hours later. Harbin, in his testimony, admitted that just before he was assaulted by Highberg he had called Highberg a son-of-a-bitch. He testified, using only initials, that his words were: "You S.O.B., go to the engine room and leave me alone and I can take care of it or something,

I could take care of it." Harbin also testified as to his later assault upon Highberg:

> Q. And at the time you were in the engine room at 10 o'clock did you and Mr. Highberg have a confrontation?
>
> A. Yes, sir. I told him I was going to take care of him.

The truth is that the evidence did not support the allegations of the complaint that Highberg was of "malicious and savage nature" and "was an incompetent crew member by reason of his savage and vicious nature." The uncontroverted evidence was to the effect that the time served by Highberg at sea was from twenty-five to twenty-six years, and that there had never been a complaint about his conduct. He had been licensed as a ship's officer by the United States Coast Guard for about twenty years, and had worked for Interlake for about three years. There was not an iota of evidence that he had a malicious, vicious and savage disposition. He was highly regarded by the men whom he supervised. He was never known to lose hs temper or to raise his voice.

Harbin testified that he had been a seaman for twenty-five years, off and on. He did not say how much time was "off" or "on"; he had worked for Interlake less than two months. Harbin was 47 years of age, 6 feet 1 inch tall, and weighed 215 pounds. Highberg was nine years younger, was shorter, and weighed less.

There was no evidence of any prior enmity between Harbin and Highberg.

On the night of the incidents four crewmen were on watch duty: Highberg, the Second Assistant Engineer; Harbin, who was a fireman and was in charge of the

operation of the boilers and stokers; an oiler, who was not a witness; and a wiper, Toivo Mikkola. All, except Highberg, were on duty from 4:00 to 8:00 p.m. Because another engineer had temporarily left the ship, Highberg was on duty from 6:00 p.m. to 12:00 midnight. The first two hours of Highberg's watch overlapped the last two of Harbin's watch, after which plaintiff would go off duty, and Highberg would then supervise another fireman, oiler and wiper. On the night of the alleged assault Highberg was the engineer of the watch, and Harbin was on duty in the fire room.

At approximately 7:00 p.m. Highberg was making a repair to the vessel, and shouted to Harbin to change the setting of a control in his area. The two men were separated by doorways and a long distance, and Harbin did not understand the instructions. Highberg climbed gown to Harbin's area.

Harbin testified that the following occurred: Highberg came down the ladder carrying a wrench and a pipe. Strong words ensued, and both men became angry. Harbin "cursed" Highberg and called him an "SOB". Then Harbin told Highberg to go back to the engine room and leave him alone, and turned his back, whereupon Highberg struck him on the hip with the pipe. Harbin fell to the floor, and was not attacked further. Then Highberg left.

Harbin testified that Highberg never did tell him what it was he wanted him [Harbin] to do, nor did Harbin assist further in making the repairs. Harbin stated that he had made no gestures or other physical provocation, and did not know that he was being attacked until the blow was struck.

Highberg, on the other hand, testified that the confrontation had been verbal only, and that he had carried

no pipe when he went down to Harbin's area. He admitted that at the time in question he had nearly completed a double shift, which had been required because the ship was shorthanded. He had been on duty twelve hours a day for the past seven days, and had had no days off for "a couple of" weeks.

The testimony is undisputed that at about ten o'clock the same evening a second confrontation occurred. Harbin returned to the engine room, swore at Highberg, made threats, and then struck Highberg in the face, knocking him down. After a struggle, Highberg upset Harbin onto his back, and the fight ended. Harbin was promptly discharged by Interlake for this attack on Highberg, yet Harbin told no one of the alleged first attack. He complained of a lacerated thumb, which Highberg had bitten when Harbin put his hand over Highberg's face. Harbin also had a lump on the back of his head where his head struck the floor in the second encounter. Harbin admitted that he had spent considerable time talking with his roommates during the time between the two confrontations, yet he had made no mention of having been hit by Highberg with a pipe.

Harbin's injuries consisted of a large hematoma on the left hip, spasms and pain in the lower back, and the lump on his head. There was testimony that the hip injury had been caused by a pipe-like instrument, and had triggered the lower back problems.

At no time during the period of Highberg's license by the United States Coast Guard had his license been revoked, nor had he been disciplined. His longtime shipmates testified that he was a man of unusually-even temper, and that he was highly regarded by his subordinates. Highberg's testimony was uncontradicted that he had not

been involved in any physical violence since he "was a kid."

Highberg was asked the question, "[I]n your experience does [sic] the conduct of an officer aboard a Great Lakes steamship striking a crew member with an iron bar the normal disposition of the ordinary officer?" His answer was "No." Highberg was also asked whether he had been provoked by Harbin and his answer was "No."

On this evidence the question whether Interlake had breached its duty to provide Harbin a seaworthy vessel by employing an officer with a proclivity for assaulting people, was submitted to the jury.

It is now well settled that a ship owner owes to the seamen employed on its vessels an absolute, nondelegable duty to provide a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Carlisle Packing Co v. Sandanger*, 259 U.S. 255 (1922). In *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336 (1955), the Supreme Court held that a ship can be unseaworthy by reason of defective personnel as well as by reason of defective gear or a leaky hull. The Court approved the formulation of *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952), in which case Judge Learned Hand stated:

> The warranty of seaworthiness as to hull and gear has never meant that the ship shall withstand every violence of wind and weather; all it means is that she shall be reasonably fit for the voyage in question. Applied to a seaman, such a warranty is, not that seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling. [*Id.* at 518.]

In *Boudoin* the plaintiff was attacked by a fellow crewman who, after a night's drinking, went to the plaintiff's room and took a bottle of brandy from under his bed. Plaintiff awoke, was startled, and the other crewman attacked him with the bottle, causing severe injuries. The District Court, in *Boudoin*, had found that shortly after the first assault, the assailant returned with a large knife, which he also intended to use on the plaintiff. The assailant continued to make threats and disturbances outside the sick bay, and episodes of drunkenness and disobedience continued for at least two days. On these facts the Supreme Court upheld the conclusion of the District Court that the ship owner had breached its warranty of seaworthiness, on the basis of its finding that the assailant was "a person of dangerous propensities and proclivities" at the time of the assault, and that he was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults." It held that "the District Court was justified in concluding that [the assailant] was not equal in disposition to the ordinary men of that calling and that the crew with [him] as a member was not competent to meet the contingencies of the voyage." 348 U.S. at 340.

In setting up its standard for the decision in *Boudoin*, the Court noted that the warranty of seaworthiness did not make a ship owner liable for injuries "from all the fisticuffs on shipboard":

> The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? [348 U.S. at 339-40.]

Thus it is plain that not every transitory occurrence of misbehavior on the part of a seaman can support a finding of a breach of the warranty of seaworthiness. To be actionable, a plaintiff's injuries must have been caused by the condition of the ship; to be material, an isolated act must be of such an aggravated character that it constitutes circumstantial evidence that during the time leading up to the assault, the ship was in an unseaworthy condition because of the presence of such an assailant. *See Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500 (1971). As the Supreme Court held in *Boudoin*, it is the "disposition" of the assailant, rather than simply the severity of the act, that is material to the issue of unseaworthiness. Quoting *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815, 817 (2d Cir. 1953) (opinion of Judge Hand), the Court said:

> All men are to some degree irascible . . . . Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is *not the measure of the "disposition" of "the ordinary men in the calling."* [Emphasis added.]

The *Boudoin* Court, in affirming the judgment of the District Court on the facts before it, discussed the difference between an "assault within the usual and customary standards of the calling" and "a case of a seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature." The Court declined to intimate what extreme of conduct need be reached before liability for unseaworthiness arises, holding only: "We do think that there was sufficient evidence to justify the District Court in holding that [the assailant] had crossed the line, that

he had such savage disposition as to endanger the others who worked on the ship." 348 U.S. at 340.

We are equally certain that in the present case that line has not been crossed.

In determining whether the defendant was entitled to a directed verdict, we have been bound to view the evidence in the light most favorable to plaintiff Harbin, and to give him the advantage of every fair and reasonable inference that the evidence may justify. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). In answer to a special interrogatory, the jury found that Highberg had struck Harbin on the hip with a steel pipe during the course of their first altercation. This finding was supported by substantial evidence and we are therefore bound to accept it. It is uncontradicted that Harbin made no physical movements that would have provoked Highberg. Just before he was struck, however, Harbin did call Highberg a bad name. This is the sole evidence that Highberg had "such savage disposition as to endanger the others who worked on the ship," and we find it insufficient as a matter of law.

To believe that Highberg had such a savage disposition would require us to believe that it had been totally concealed during his twenty years as a licensed officer. In the alternative, we would be required to believe that his victims during that entire time had been so intimidated that no complaint leading to disciplinary proceedings had ever been brought against him. Further, we would be required to believe that two seamen who testified under oath that Highberg was of even temper and that he was liked by all, did not tell the truth.

Further, we would have to disregard Harbin's own admissions against interest that he himself had provoked

Highberg by "cursing" him and calling him an "SOB," and by being uncooperative and insubordinate. We would have to believe it was reasonable that this admitted provocation had no effect on Highberg.

Finally, we cannot accept as "savage" within the *Boudoin* standard, the blow itself. Although a steel pipe is potentially a dangerous weapon, the uncontroverted evidence showed that there was only a single blow to a nonvital part of the body, the side of the left hip in the vicinity of the pocket in a normal pair of men's trousers. This location is considerably removed from the head, which is the only target to which an assailant from behind could be assured of doing lethal harm.

As a matter of law, the evidence in this record does not support a finding of a savage disposition. Rather, it is well within the range of mere irascibility, which the courts have found might well lead to physical encounters between men at sea. We so hold, without the benefit of any formal findings of the normal frequency of violence on board ship; rather, we hold that the conduct complained of here does not constitute "a wicked disposition, a propensity to evil conduct, a savage and vicious nature," with which terms the *Boudoin* Court described the sort of person whose mere presence could render a ship unseaworthy.

We have omitted from our previous discussion any mention of two matters that might seem to bear on the case. First, the jury returned its answer to a special interrogatory, in which it found that Highberg was "an officer not equal in disposition and seamanship to ordinary officers and men in his calling." Second, Highberg himself testified, on examination by the plaintiff, that in his experience "the conduct of an officer aboard a Great Lakes steamship striking a crew member with an iron bar [was

not] the normal disposition of the ordinary officer." He further testified that he was not provoked.

Initially, we point out that none of these statements is conclusive of the issue in the case. It is clear that the savagery concept, being specific, is the applicable test for a finding of unseaworthiness. It is plain that the intent of the *Boudoin* Court was to specify a high degree of viciousness as the standard of what constitutes abnormality.

As we have discussed, the answer to the special interrogatory was insufficient and did not determine the issue of savagery. Similarly, the testimony of Highberg is unsupported by any showing that he was aware of the legal conclusion as to which he was giving his opinion. There is also the question whether Highberg's employer, Interlake, is bound by Highberg's opinions as to legal matters which are within the province of a court to determine.

Further, the testimony was ambiguous, tending to equate conduct with a disposition. Certainly the act of striking a crew member is not normal conduct for a ship's officer; but we cannot discern in Highberg's testimony any intent to admit liability on the part of Interlake, or that the alleged assault constituted such a danger to others as to satisfy the *Boudoin* standard.

Our view of this case is squarely in accord with prior authority in the area. The *Boudoin* Court cited with approval Judge Hand's decision in *Jones v. Lykes Bros. S.S. Co.*, 204 F.2d 815 (2d Cir.), *cert. denied*, 346 U.S. 857 (1953). In that case an argument arose between the plaintiff and his assailant, remarkably similar to that concerned here. The assailant had no record of previous violence, and there was no prior enmity between him and the plaintiff. During the lengthy altercation, in which fists only

were used, the plaintiff's hip was broken, and his assailant continued to pound him after he fell. On these facts the Court found insufficient evidence that the assailant was so savage as to be beyond the standards of the calling.

Accord, Gulledge v. United States, 474 F.2d 1340 (3d Cir. 1973), *aff'g* 337 F. Supp. 1108 (E.D. Pa. 1972); *Kirsch v. United States*, 450 F.2d 326 (9th Cir. 1971) (insufficient evidence of savage character where engineer, who committed unprovoked assault with fists over minor disagreement, had had five fights over thirty-year period); *Robinson v. S. S. Atlantic Starling*, 369 F.2d 69 (5th Cir. 1966), *cert. denied*, 386 U.S. 993 (1967) (seaman who stabbed cruel, abusive captain properly found by District Court to be a "quiet, peaceful, efficient seaman"); *Connolly v. Farrell Lines, Inc.*, 268 F.2d 653 (1st Cir.), *cert denied*, 361 U.S. 902 (1959) (insufficient evidence of unseaworthiness where seaman made threats of violence against plaintiff, and subsequently struck plaintiff in the head with three-foot board when plaintiff advanced on him); *Stankiewicz v. United Fruit S.S. Corp.*, 229 F.2d 580 (2d Cir. 1956). The fact that one of the seamen in the present case was a petty officer does not, in our judgment, call for the application of a different rule.

There is only one other issue which needs to be discussed because of the possibility of further appellate review and the necessity of our ruling on all issues in order that no remand need be made to our Court with respect thereto. That issue relates to the impropriety of the argument of plaintiff's counsel to the jury with respect to the good character of his client. Counsel had offered no proof as to such good character of his client and on his motion the Court had excluded evidence of his client's bad character, which evidence had been proffered by the defendant. The pertinent part of counsel's argument is appended hereto.

Plaintiff, in answer to defendant's interrogatories, admitted that he had been convicted of armed robbery in Detroit, Michigan, thirteen years earlier and was placed on probation; and that he had been convicted of a Dyer Act violation in the Federal District Court in Detroit fifteen years earlier, and had served eighteen months in the federal prison at Milan, Michigan. The District Court had excluded such evidence because of the lapse of more than ten years since conviction. Fed. R. Evid. 609. If, however, plaintiff had offered evidence as to his good character, then evidence of the old crimes, and even arrests, would have been admissible. Fed. R. Evid. 404, 405, 608, 609. *Cf. United States v. Wells,* 525 F.2d 974 (5th Cir. 1976).

The District Court also excluded evidence proffered as to plaintiff's chronic alcoholism, his tendency to become "pretty wild" when drinking, and his drinking on the evening of the incidents just before he committed an assault on Highberg.

Counsel for the plaintiff argued to the jury that his client was not a "bad guy," and that if he had been a "bad actor" defendant "would have brought witnesses from all over" to testify concerning plaintiff's "malevolent nature."

When plaintiff's counsel was making such argument counsel well knew that the defendant could not produce any such evidence because the Court, on counsel's motion, had forbidden the defendant from introducing the evidence as to prior crimes and other misconduct, which evidence defendant had actually procured and had proffered.

The District Court committed prejudicial error, in our opinion, in overruling objections to such argument of plaintiff's counsel, and in overruling defendant's motion for

a mistrial. The permitting of such argument may have had some influence on the verdict which the jury returned.

Accordingly, the judgment on the maintenance and cure count is affirmed. The judgment of $10,000 damages for unseaworthiness is reversed and judgment is entered in favor of the defendant.

Each party shall pay his or its own costs.

The following excerpt is taken from the Appendix, pages 76-77:

> I believe that there is no testimony in this case that Al Harbin is a bad guy. There is no one who has been called to say that he is a bad actor, a bad fellow. If he had been, or such evidence were available, Interlake would have brought witnesses from all over, as they have already done so, all over to testify concerning the malevolent nature of Al Harbin, that he is a bad egg.
>
> Mr. Davies: Your Honor, I object.
>
> The Court: Approach the bench.
>
> [266] (Following proceedings had out of hearing of the jury.)
>
> Mr. Davies: Such evidence would have been irrelevant, I don't believe it is proper argument.
>
> (Reporter read back the last portion of argument.)
>
> The Court: That is his interpretation.
>
> Mr. Davies: Well, your Honor, insofar as felony convictions are concerned, so far as prior arrests are concerned, this would have been excluded and I see no way any contrary evidence would have been admitted.
>
> The Court: Overruled.

(Following proceedings had back in hearing of the jury.)

Mr. Stewart: There was no such evidence.

They, Interlake, brought before you Mr. Mikkola. And they took advantage of Mr. Mikkola's testimony, as you heard it from the witness stand, because it was just, according to Mr. Mikkola, a short point in time ago that he was asked to come and tell you or asked about the events involving [267] Mr. Highberg's activities with him on the night of this occurrence. You remember what he had to say.

Surely if they would bring Mr. Mikkola to tell you about that night's events on such short notice of requesting information from him when it is two some odd years later, they would have brought other people to testify concerning Mr. Harbin.

Mr. Davies: Your Honor, may I make a statement on the record, please?

(Following proceedings had out of hearing of the jury.)

Mr. Davies: Your Honor, I move for a mistrial on the ground of improper argument.

The Court: What is the basis for it?

Mr. Davies: The same thing, your Honor. This would not be admissible had we brought it in.

(Reporter read back the last portion of argument.)

The Court: Overruled.

Judgment Entry of the Court of Appeals
For the Sixth Circuit

(Filed January 27, 1978)

No. 76-1568

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALVIN E. HARBIN,
Plaintiff-Appellee,

v.

THE INTERLAKE STEAMSHIP COMPANY,
Defendant-Appellant.

Before: WEICK and CELEBREZZE, *Circuit Judges*, and GRAY, *District Judge.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court on the maintenance and cure count is affirmed. The judgment of $10,000 damages for unseaworthiness is reversed and judgment is entered in favor of the defendant.

Each party shall pay his or its own costs.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

APPENDIX B

Judgment Entry of the District Court

(Filed December 8, 1975)

No. C75-579

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALVIN E. HARBIN,
Plaintiff,

v.

THE INTERLAKE STEAMSHIP COMPANY,
Defendant.

This action came on for trial before the Court and a jury, Honorable Robert B. Krupansky, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff recover from the defendant the sum of Ten Thousand ($10,000.00) Dollars and costs.

/s/ Robert B. Krupansky
United States District Judge

APPENDIX C

46 U.S.C. Section 688

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Federal Rules of Evidence, Section 609

Rule 609. Impeachment by evidence of conviction of crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial

effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The Court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satis-

fied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Supreme Court, U. S.
FILED
MAY 31 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-1530

ALVIN E. HARBIN,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERLAKE STEAMSHIP COMPANY, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINION

The Opinion of the United States Court of Appeals for the Sixth Circuit by Circuit Judges Weick and Celebrezze and District Judge Gray is reported in 570 F.2d 99.

QUESTIONS PRESENTED

The statement by Petitioner Harbin of the questions presented is unacceptable. The questions the case presents are:

1. Whether on its facts this case of an assault on shipboard would justify a determination that the vessel was unseaworthy—or whether, as the court below held, the proof failed to show the assailant was of the "savage and vicious nature" the law demands before the vessel may be adjudged unseaworthy.

2. Whether it is, as the court below held, misconduct for counsel for Petitioner Seaman Harbin to argue no one "has been called to say that he [Harbin] is a bad actor" and that if there were such evidence Respondent "Interlake would have brought witnesses from all over", after successfully excluding from the evidence proof that Harbin had been convicted of armed robbery and of a Dyer Act violation and after excluding evidence of Petitioner Harbin's "chronic alcoholism, his tendency to become 'pretty wild' when drinking, and his drinking on the evening of the incidents" (A 14) for which he sues Respondent Interlake.

NO STATUTE IS INVOLVED

Petitioner Harbin erroneously says the Jones Act, 46 U.S.C. §688, is involved. A Jones Act claim was included in the complaint, but Petitioner abandoned that claim.

STATEMENT OF THE CASE

The case presents a factual question only. The Court of Appeals correctly pointed out:

> "The truth is that the evidence did not support the allegations of the complaint that Highberg was of 'malicious and savage nature' and 'was an incompetent crew member by reason of his savage and vicious nature.' The uncontroverted evidence was to the effect that the time served by Highberg at sea was from twenty-five to twenty-six years, and that there had never been a complaint about his conduct. He had been licensed as a ship's officer by the United States Coast Guard for about twenty years, and had worked for Interlake for about three years. There was not an iota of evidence that he had a malicious, vicious and savage disposition. He was highly regarded by the men whom he supervised. He was never known to lose his temper or to raise his voice." A4

Moreover,

> "There was no evidence of any prior enmity between Harbin and Highberg." A4

THERE IS NO REASON TO GRANT THE WRIT

A factual question only arises on this record.

That question is whether on its facts this case falls on the side of the *Boudoin v. Lykes Brothers Steamship Co., Inc.* (1955), 348 U.S. 336, line of "wicked disposition, a perversity to evil conduct, a savage and vicious nature" that justifies a determination that the vessel was unseaworthy, or whether it falls on the other side of that line as in the opinion of Judge Learned Hand in *Jones v. Lykes Brothers Steamship Co., Inc.,* (2d Cir.) 204 F.2d 815, *cert. denied* (1953), 346 U.S. 857, *reh. denied,* 346 U.S. 905 and 348 U.S. 960, which this Court approved in *Boudoin.*

The Court of Appeals held the latter.

Other Courts of Appeals likewise have correctly applied that test:

Connolly v. Farrell Lines, Inc. (1st Cir., 1959), 268 F.2d 653, *cert. denied* (1959), 361 U.S. 902;

Walters v. Moore-McCormack Lines, Inc. (2nd Cir., 1962), 309 F.2d 191;

Stankiewicz v. United Fruit Steamship Corporation (2d Cir., 1956), 229 F.2d 580.

There is no conflict in the circuits.

The conflict is only among the facts of the cases that have come before the courts. The *Boudoin* test has been applied in these cases on the basis of their facts and each adjudged to fall on the one side or the other of the *Boudoin* line.

CONCLUSION

The writ should be denied.

Respectfully submitted,

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May 24, 1978

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